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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

VERNON UNSWORTH,

Plaintiff

v.

ELON MUSK,

Defendant.

Case No. 2:18-cv-08048-SVW (JCx)

**SECOND JOINT STIPULATION ON
 PLAINTIFF'S MOTION TO COMPEL**

Hearing Date: Nov. 12, 2019
 Time: 9:30 a.m.
 Courtroom: 750
 Discovery Cutoff: Sept. 13, 2019
 Pretrial Conference: Nov. 25, 2019
 Trial Date: Dec. 3, 2019

1 PLEASE TAKE NOTICE THAT on November 12, 2019, at 9:30 a.m. in
2 Courtroom 750 of the above-titled Court, Plaintiff Vernon Unsworth will move this
3 Court for an order granting Plaintiff's Motion to Compel pursuant to Fed. R. Civ. P.
4 37 and Local Rule 37. Plaintiff's Motion to Compel is made pursuant to this Notice
5 of Motion, the parties' Second Joint Stipulation on Plaintiff's Motion to Compel and
6 supporting declarations, Plaintiff's forthcoming supplemental memorandum of law
7 and proposed order pursuant to Local Rule 37-2.3, and any such additional argument
8 or materials as may be submitted to the Court before the time of the decision in this
9 matter.

10
11 DATED: October 22, 2019

Respectfully submitted,

L. LIN WOOD, P.C.

By: /s/L. Lin Wood

L. Lin Wood

Attorneys for Plaintiff Vernon Unsworth

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1 Pursuant to Federal Rule of Civil Procedure 37, and Rule 37 of the Local Rules
2 of Practice for the United States District Court for the Central District of California,
3 Plaintiff Vernon Unsworth (“Unsworth”) and Defendant Elon Musk (“Musk”) submit
4 this Joint Stipulation in connection with Unsworth’s Motion to Compel discovery
5 responses from Musk in this defamation lawsuit. As required by L.R. 37-1, the parties
6 held multiple telephonic and electronic meet and confer attempts to resolve this issue
7 prior to seeking the Court’s intervention. (Declaration of G. Taylor Wilson (“WD”)
8 at ¶¶ 2-3, Exs. A, B, C.)

9 **I. PRELIMINARY STATEMENTS.**

10 **A. Unsworth’s Preliminary Statement**

11 This discovery dispute arises from (1) Musk wiping his cell phone in or about
12 May 2019, while this litigation was ongoing, (2) his counsel’s initial representation
13 during an August 9, 2019, meet and confer that no record of his cell phone existed,
14 (3) Musk’s subsequent testimony in August 2019 that his phone was backed up to
15 iCloud, (4) his refusal thereafter to search his iCloud until October 1, 2019—more
16 than two weeks after the discovery deadline—despite previous claims that he searched
17 it and no responsive information existed, and (5) Musk’s use of unreasonably narrow
18 search terms to finally search his phone on October 1, only after he had been served
19 with a stipulation on this motion to compel. Musk only searched his iCloud backup
20 after Unsworth served him with a stipulation for a motion to compel on September
21 25, (WD ¶ 13, Ex. H, I), and after third-parties disclosed relevant and responsive text
22 messages with Musk on October 1—which gave lie to the notion that no responsive
23 texts existed, (WD ¶ 14, Exs. J, K). On October 2, Musk provided an iCloud Search
24 Certification (“Certification”) describing the inadequate search efforts that failed to
25 reveal any documents. (WD ¶¶ 15-16, Exs. L-N). The Certification does not claim his
26 iCloud is devoid of responsive documents and communications; rather, the search was
27
28

1 transparently designed to avoid uncovering text messages that indisputably exist.¹ To
 2 this day, Musk has not produced a single text message he sent or received. (WD ¶ 4).

3 Unsworth asks the Court to compel Musk to search his iCloud and other phone
 4 backups—both of which also indisputably exist according to the Certification (WD
 5 Ex. N)—and produce information responsive to Unsworth’s discovery requests. The
 6 search should include both (1) an eyes-on review of all of Musk’s text messages with
 7 all contacts, and (2) a keyword search of said text messages for this period using the
 8 terms set forth below; and, as Musk himself concedes, documents from July through
 9 September of 2018 should be searched. (*See id.* (searching same period)).

10 For more than two months, Unsworth’s counsel has explicitly demanded that
 11 Musk produce responsive documents from his phone, including text messages. (WD
 12 ¶¶ 3-9; Exs. A, B, C). In return, Musk has given false and shifting excuses. In an
 13 August 9, 2019, meet and confer, Musk’s counsel said Musk changed phones and that
 14 no record of his prior phone was available. (WD ¶ 5). This defies reason, as Musk and
 15 his companies are involved in lawsuits imposing litigation holds. (WD Ex. E).

16 Then Musk testified on August 22 that he changed phones “three months ago”
 17 but that it may have been backed-up on iCloud. (WD ¶ 6, Ex. D). Since Musk’s
 18 testimony, Unsworth has repeatedly demanded that Musk search his phone or backups
 19 (including iCloud) and produce responsive documents. (WD ¶ 7, Exs. A, B, C). On
 20 September 23, Musk eventually, and nonsensically, stated that the record custodian
 21 affidavits attached to his companies’ third-party document productions somehow
 22 show that backups of his phone were searched and revealed no responsive documents.
 23 (WD ¶ 7, Ex. A p. 2) (stating the affidavits “are more than sufficient and we have
 24 confirmed that there is nothing further”). Yet, at the very end of discovery, Tesla
 25 produced an email from Musk describing a text from his girlfriend about negative
 26 press about the tube—which was clearly responsive and should have been produced

27
 28 ¹ Musk has a pattern of withholding his text messages, and was recently ordered to
 produce his texts in another matter. *See* <https://dailym.ai/2ILpApO>.

1 earlier. (WD ¶ 11, Ex. C pp. 1, 6). Unsworth brought this email to Musk’s attention,
2 and again Musk failed to produce any of his text messages. (WD ¶ 11, Ex. C. p.1, 6).

3 Finally, on October 1, despite Musk consistently denying that responsive texts
4 existed, third-party deponents Steve Davis and Dave Arnold produced text exchanges
5 with Musk about the tube and defamatory emails to Ryan Mac—although they did so
6 minutes before or during their depositions. (WD ¶ 14, Exs. J, K). Their texts with
7 Musk are indisputably responsive and provide incontrovertible evidence that Musk—
8 who did not himself produce any of these texts—has actively hidden evidence during
9 discovery. (*See* WD 14, Ex. O (RFPs 1, 23, 24, 63, 64)).

10 Despite Musk previously stating that his iCloud had been searched (including
11 as of September 23, 2019), on October 2, 2019, and only after Unsworth sent Musk a
12 stipulation for a motion to compel the phone documents, Musk provided the
13 Certification that he searched his iCloud, which did not yield a single document. (WD
14 Exs. L, N). The Certification admits that his phones are regularly preserved through
15 imaging and iCloud, and that iCloud *was searched for the first time on October 1,*
16 *weeks after discovery ended.* (WD Ex. N). *That searched used grossly narrow*
17 *keywords designed to avoid collecting responsive texts. (Id.).* The Certification *does*
18 *not state that the phone backups are actually devoid of documents responsive to*
19 *Unsworth’s pending discovery requests. (Id.).* The keywords used to search Musk’s
20 iCloud would not uncover the text messages between Musk and Davis or Arnold, and
21 do not include obvious standalone terms like Thai, Thailand, cave, rescue, Mac, or
22 BuzzFeed. (*Id.*). In short, Musk crafted keywords that are grossly incomplete and
23 instead appear to purposefully avoid uncovering texts that indisputably exist.

24 Musk’s statement in his portion of the previous stipulation for a motion to
25 compel made no attempt to explain Musk’s false and shifting explanations about
26 preserving his phone or his failure to search his phone until October 1, 2019. (WD
27 Ex. M). Instead, Musk decreed that he “submitted a detailed declaration on this issue,
28 which resolved it.” (*Id.* at 1 n.1) Musk cannot dispute that Unsworth’s requests related

1 to text messages and iCloud are calculated to lead to the discovery of admissible
2 evidence on falsity, negligence, and actual malice. Nor can Musk argue that
3 Unsworth has been dilatory in seeking the phone information, particularly given
4 Musk's false statements about his phone being destroyed and their being no backup.

5 Musk will not "resolve it" until he is forced to produce responsive documents
6 from his phone, iCloud, or its other backups. Unsworth respectfully requests that the
7 Court order Musk to comply with discovery and produce documents after an
8 exhaustive search of the phone data that Musk has so doggedly attempted to hide.

9 **B. Musk's Preliminary Statement**

10 Unsworth's motion to compel is misleading, unnecessary, and in violation of
11 the Local Rules. This is a manufactured dispute. Musk has agreed to every search
12 of documents Unsworth has ever requested, including this one. Unsworth's case is
13 failing, and he is grasping at non-existent straws. The motion should be denied, and
14 Unsworth and his counsel should be sanctioned.

15 First, Unsworth's motion asserts that Musk has given "false and shifting"
16 excuses about his text messages and that he has "hidden evidence." This is blatantly
17 false. Musk has been clear, open, and honest from the beginning. He changes his
18 phone frequently. (Musk Tr. 313: 10 – 315: 18) (Lifrak Decl. Ex. A).² The content
19 of his phone is backed up on the iCloud. (*Id.*). Musk searched that data in July
20 2019, which produced no results. (Lifrak Decl. ¶4). When Unsworth complained
21 and requested an identification of the search terms, Musk searched again in October
22 2019, disclosed the search terms that had been used, and he also provided a
23
24
25

26 ² Musk's counsel never stated that "no record of [Musk's] cell phone existed,"
27 as Unsworth claims. All Musk's counsel stated was that Musk changes his phone
28 frequently.

1 declaration attesting to the search. (Lifrak Decl. Ex. B).³ In his portion of the joint
 2 stipulation, Unsworth asks Musk to search additional terms. Musk has agreed to do
 3 exactly that. (Lifrak Decl. Ex. C).

4 Second, the motion is unnecessary. It requests that Musk use additional
 5 search terms on his texts. Musk has agreed to do so. (*Id.*).

6 Third, the motion is in violation of the Local Rules. Unsworth's counsel
 7 simply did not "confer in a good faith effort to eliminate the necessity for hearing
 8 the motion." (L.R. 37-1). In fact, the first time Unsworth's counsel provided the
 9 requested new search terms was in his portion of this joint stipulation. This is in
 10 violation of the Local Rules because:

- 11 • Unsworth's counsel did not send a letter requesting a meet and confer
 12 conference "specify[ing] the terms of the discovery order sought." (L.R. 37-
 13 1).
- 14 • Unsworth's counsel did not participate in an in-person or telephonic
 15 conference prior to transmitting his portion of the joint stipulation in an effort
 16 to avoid motion practice. (L.R. 37-1).

17 Unsworth's counsel did not provide *any* letter or attempt to meet and confer
 18 in *any* way regarding the newly-requested search terms. This is the opposite of
 19 meeting and conferring in good faith, and it directly violates the Local Rules.
 20 Unsworth and his counsel should be sanctioned as a result. *See* L.R. 37-4 ("failure
 21 of any counsel to comply with or cooperate in the foregoing procedures may result
 22 in the imposition of sanctions."). After Musk provided a declaration about the
 23 October search, Unsworth's counsel said nothing until emailing his portion of this
 24 joint stipulation. Counsel was clearly frustrated that the tactic of shifting focus
 25

26 ³ The declaration does not say that Musk's iCloud was "searched for the first
 27 time on October 1," as Unsworth claims. In fact, Musk's iCloud was searched in
 28 July and again in October, at Unsworth's request. (Lifrak Decl. ¶¶ 4-5).

1 away from his failing case and onto some invented discovery issue would bear fruit,
2 and it didn't, hence the frivolous application to the Court.⁴

3 **II. DISCOVERY DISPUTES AT ISSUE**

4 **A. Unsworth's Document Requests and Musk's Responses**

5 **REQUEST FOR PRODUCTION NO. 1:** All documents and
6 communications concerning or relating to the Defamatory Statements.

7 Musk's Responses and Objections to Request for Production No. 1:
8 Defendant incorporates his General Objections herein. Defendant further objects to
9 Request No. 1 on the grounds that it seeks information that is outside of his
10 possession, custody, or control, or that is equally available to Plaintiff. Defendant
11 further objects to Request No. 1 as argumentative in that it requires the adoption of
12 improper assumptions including that any statement referenced in this Request was
13 defamatory. Defendant further objects to Request No. 1 to the extent that it seeks to

14
15 ⁴ Unsworth's own conduct in this case has been egregious, as he has failed to
16 produce relevant documents for months. Unsworth's first production contained fewer
17 than 500 pages of self-serving documents, which were self-selected by
18 Unsworth. (Lifrak Decl. ¶ 7). After counsel for Musk identified materials that were
19 clearly missing, Unsworth produced another 3,000 pages on the eve of his
20 deposition. (Lifrak Decl. ¶ 8). But there were still missing documents. Only after
21 discovery had closed, and months after his deposition did Unsworth finally produce
22 approximately 300 pages of additional materials that materially harm his case. (Lifrak
23 Decl. ¶9). For example, the 82-page text conversation between Unsworth and Thanet
24 Natisri, which contained journal-like details of Unsworth's activities during and after
25 the rescue, including his criticisms of the divers who risked their lives, was not
26 produced until September 23. (Supplemental Declaration of Michael Lifrak in
27 support of Elon Musk's Motion for Summary Judgment, DKT 85, Ex. 28). Unsworth
28 also withheld all communications with his agent (who he claimed in his deposition
did not exist) and communications that depict Unsworth's attempt to monetize his
role in the rescue, until October 4, after Musk had threatened to move to compel the
information. (Lifrak Decl., Exs. D, E). Last, but not least, Unsworth has continued to
deny that responsive communications between himself and his partner, Tik, exist. It
defies credulity that a couple who spends significant periods of time apart has never
discussed the cave rescue, or any of the topics related to this litigation, via some form
of messaging.

1 elicit information subject to and protected by the attorney-client privilege, the attorney
 2 work product doctrine, the joint defense privilege, the common interest doctrine,
 3 and/or any other applicable privilege or immunity. Defendant further objects to
 4 Request No. 1 on the grounds that the Request is overly broad and unduly burdensome
 5 and seeks documents that are not proportional to the needs of the case. Subject to his
 6 General and Specific Objections, Defendant responds as follows: To the extent that
 7 such documents exist, are within Defendant's possession, custody, or control, and can
 8 be located after a reasonably diligent inquiry, Defendant will produce relevant, non-
 9 privileged documents responsive to this request, as Defendant understands it.
 10 (WD Ex. O).

11 **REQUEST FOR PRODUCTION NO. 7:** All documents and
 12 communications concerning or relating to any effort by you or your representative to
 13 verify the truthfulness or accuracy of the Defamatory Statements, whether before or
 14 after the Defamatory Statements were published.

15 **Musk's Responses and Objections to Request for Production No. 7:**
 16 Defendant incorporates his General Objections herein. Defendant further objects to
 17 Request No. 7 on the grounds that it seeks information that is outside of his
 18 possession, custody, or control. Defendant further objects to Request No. 7 on the
 19 grounds that it is vague and ambiguous with regard to the terms "representative,"
 20 "verify," "accuracy," and "published." Defendant further objects to Request No. 7 as
 21 argumentative in that it requires the adoption of improper assumptions including that
 22 any statement referenced in this Request was defamatory. Defendant further objects
 23 to Request No. 7 to the extent that it seeks to elicit information subject to and protected
 24 by the attorney-client privilege, the attorney work product doctrine, the joint defense
 25 privilege, the common interest doctrine, and/or any other applicable privilege or
 26 immunity. Defendant further objects to Request No. 7 on the grounds that the Request
 27 is overly broad and unduly burdensome and seeks documents that are not proportional
 28 to the needs of the case.

1 Subject to his General and Specific Objections, Defendant responds as
2 follows:

3 To the extent that such documents exist, are within Defendant's
4 possession, custody, or control, and can be located after a reasonably diligent inquiry,
5 Defendant will produce relevant, non-privileged documents responsive to this
6 request, as Defendant understands it.

7 (*Id.*).

8 **REQUEST FOR PRODUCTION NO. 23:** All documents and
9 communications concerning or relating to your emails with Buzzfeed referenced in
10 the Complaint, including the reason(s) you decided to send the emails.

11 **Musk's Responses and Objections to Request for Production No. 23:**
12 Defendant incorporates his General Objections herein. Defendant further objects to
13 Request No. 23 on the grounds that it seeks information that is outside of his
14 possession, custody, or control. Defendant further objects to Request No. 23 to the
15 extent that it seeks to elicit information subject to and protected by the attorney-client
16 privilege, the attorney work product doctrine, the joint defense privilege, the common
17 interest doctrine, and/or any other applicable privilege or immunity. Defendant further
18 objects to Request No. 23 on the grounds that the Request is overly broad and unduly
19 burdensome and seeks documents that are not proportional to the needs of the case.
20 Subject to his General and Specific Objections, Defendant responds as follows: To
21 the extent that such documents exist, are within Defendant's possession, custody, or
22 control, and can be located after a reasonably diligent inquiry, Defendant will produce
23 relevant, non-privileged documents responsive to this request, as Defendant
24 understands it.

25 (*Id.*).

26 **REQUEST FOR PRODUCTION NO. 24:** All documents and
27 communications concerning or relating to any public relations analysis or strategy
28 pertaining to the Defamatory Statements.

Musk's Responses and Objections to Request for Production No. 24:

Defendant incorporates his General Objections herein. Defendant further objects to Request No. 24 on the grounds that it seeks information that is outside of his possession, custody, or control. Defendant further objects to Request No. 24 on the grounds that it is vague and ambiguous with regard to the terms "public relations analysis or strategy." Defendant further objects to Request No. 24 as argumentative in that it requires the adoption of improper assumptions including that any statement referenced in this Request was defamatory. Defendant further objects to Request No. 24 to the extent that it seeks to elicit information subject to and protected by the attorney-client privilege, the attorney work product doctrine, the joint defense privilege, the common interest doctrine, and/or any other applicable privilege or immunity. Defendant further objects to Request No. 24 on the grounds that the Request is overly broad and unduly burdensome and seeks documents that are not proportional to the needs of the case. Subject to his General and Specific Objections, Defendant responds as follows: To the extent that such documents exist, are within Defendant's possession, custody, or control, and can be located after a reasonably diligent inquiry, Defendant will produce relevant, non-privileged documents responsive to this request, as Defendant understands it.

(*Id.*).

REQUEST FOR PRODUCTION NO. 63: All documents and communications concerning or relating to the Cave Rescue.

Musk's Response to Request for Production No. 63: Defendant incorporates his General Objections herein. Defendant further objects to Request No. 63 on the grounds that it seeks information that is outside of his possession, custody, or control, or that is equally available to Plaintiff. Defendant further objects to Request No. 63 to the extent that it is redundant to requests for production propounded in Plaintiff's First Set of Requests for Production to Defendant Elon Musk. Defendant further objects to Request No. 63 to the extent that it seeks to elicit information subject

1 to and protected by the attorney-client privilege, the attorney work product doctrine,
 2 the joint defense privilege, the common interest doctrine, and/or any other applicable
 3 privilege or immunity. Defendant further objects to Request No. 63 on the grounds
 4 that the Request is overly broad and unduly burdensome and seeks documents that
 5 are not proportional to the needs of the case. Subject to his General and Specific
 6 Objections, Defendant responds as follows: To the extent any such documents or
 7 communications exist, Defendant has already produced all responsive materials in his
 8 possession, custody, or control based on a reasonable search and diligent inquiry.
 9 (*Id.*).

10 **REQUEST FOR PRODUCTION NO. 64:** All documents and
 11 communications concerning or relating to your role in designing, creating, and/or
 12 building the Tube.

13 **Musk's Response to Request for Production No. 64:** Defendant
 14 incorporates his General Objections herein. Defendant further objects to Request No.
 15 64 on the grounds that it seeks information that is outside of his possession, custody,
 16 or control, or that is equally available to Plaintiff. Defendant further objects to Request
 17 No. 64 to the extent that it is redundant to requests for production propounded in
 18 Plaintiff's First Set of Requests for Production to Defendant Elon Musk. Defendant
 19 further objects to Request No. 64 on the grounds that it is vague and ambiguous with
 20 regard to the terms "designing," "creating," and "building." Defendant further objects
 21 to Request No. 64 on the grounds that it seeks to elicit information subject to and
 22 protected by the attorney-client privilege, the attorney work product doctrine, the joint
 23 defense privilege, the common interest doctrine, and/or any other applicable privilege
 24 or immunity. Defendant further objects to Request No. 64 on the grounds that the
 25 Request is overly broad and unduly burdensome and seeks documents that are not
 26 proportional to the needs of the case. Subject to his General and Specific Objections,
 27 Defendant responds as follows: To the extent any such documents or communications
 28

1 exist, Defendant has already produced all responsive materials in his possession,
2 custody, or control based on a reasonable search and diligent inquiry.

3 (*Id.*).

4 **B. Unsworth's Position**

5 Musk respectfully requests that this Court issue an order pursuant to Federal
6 Rule of Civil Procedure 37 compelling Musk to search his cell phone and its backups,
7 (including on iCloud) and produce responsive documents.

8 Musk has not disclosed any information from his phone in response to any of
9 Unsworth's requests for production of documents—which is to say that each of
10 Musk's responses to Unsworth's seventy-four requests for production of documents
11 may be incomplete. Nevertheless, Unsworth listed six of his requests above to show
12 that Musk is hiding documents and should have responded to the requests by
13 disclosing his texts with Davis and Arnold, and more. Musk has no excuse for failing
14 to disclose responsive text messages. Instead, the day after the third-party
15 productions—when it became impossible to argue that Musk did not have responsive
16 text messages, and Unsworth was on the eve of submitting his first stipulation for a
17 motion to compel—Musk created the Certification that describes a search of his
18 iCloud that was crafted to purposefully avoid uncovering responsive text messages.
19 As described above and below, Musk has gone to great lengths to hide the information
20 on his phone or its backups. And it appears that nothing short of a court order will
21 make him comply with his discovery obligations.

22 First, on August 9, 2019, Musk's counsel falsely stated Musk changed phones
23 and that no record of his prior phone was available. (WD ¶ 5).

24 Second, in his deposition on August 22, 2019, Musk testified that he destroyed
25 his cell phone only a few ("maybe ... three") months ago, (WD ¶ 6, Ex. D (313:20-
26 314:13)), which would have been after this Court denied his Motion to Dismiss and
27 discovery was starting, (ECF No. 34 (dated April 29, 2019)). Indeed, Musk is under
28 various litigation holds in several lawsuits, (WD ¶ 9, Ex. F (31:1-18)), and it strains

1 credulity that Musk's phone would not be backed up on iCloud and through other
2 means.

3 Third, Musk also testified that his phone records are stored electronically and
4 may have been backed up to his iCloud, (WD ¶ 6, Ex. D (315:8-18)). And Birchall
5 testified on September 10, 2019, that there may have been texts between him and
6 Musk regarding the Howard investigation, although he was not sure if that was the
7 case, (WD ¶ 8 (Birchall Depo. 10:5-10:22)). At this point, Musk's team should ceded
8 to Unsworth's request that they search Musk's iCloud and produce responsive
9 documents.

10 Fourth, instead of actually searching and producing Musk's responsive text
11 messages, his lawyers vaguely stated that there was no responsive information; and,
12 that somehow, Tesla, SpaceX, and The Boring Company's rote records custodian
13 affidavits were sufficient to confirm that there was no responsive information. (*See*,
14 *e.g.*, WD ¶ 7, Ex. A at 2). Indeed, Musk's counsel stated repeatedly prior to the
15 October 1 Certification, among other things: that "[t]here is nothing further on the
16 cloud"; that "[t]he declarations⁵ provided to you are more than sufficient and we have
17 confirmed there is nothing further"; that "the IT Professional who confirmed you have
18 everything signed a declaration"; and that Tesla, SpaceX, and The Boring Company's
19 production "included a declaration and the SpaceX tech team who signed that
20 declaration confirmed what I already stated, which is implicit in their declaration."
21 (WD ¶ 7, Exs. A (pp. 2-3), B (p. 3)). Yet, Tesla, SpaceX, and The Boring Company's
22 affidavits were merely form records custodian certifications by third-parties; there
23 was no indication that they possessed, controlled, or searched Musk's iCloud or phone
24 images, and there was no indication that they even knew that Musk had destroyed his
25

26
27 ⁵ Musk's counsel consistently and incorrectly refers to notarized records
28 affidavits as declarations.

1 cell phone and that his iCloud and images needed to be searched. (WD Ex. G).⁶

2 Fifth, after conferring with Musk for more than a month and a half, Unsworth
3 served Musk with a stipulation for a motion to compel, including after Unsworth
4 uncovered a document in Tesla's end-of-discovery production in which Musk
5 described a text form his girlfriend about press coverage of the tube. (WD ¶¶ 11-12,
6 Exs. C (pp. 1, 6), H, I).

7 Sixth, after Unsworth sent over the stipulation for the motion, third-party
8 witnesses started showing up at their depositions with relevant text messages between
9 them and Musk that are indisputably responsive to Unsworth's requests for
10 production of documents, including numbers 1, 23, 24, 63, and 64. (WD ¶ 14, Exs.
11 J, K, P).

12 Sixth, after serving the stipulation for the motion, Musk finally confirmed on
13 October 2, and for the first time, that his counsel's August 9, 2019, representations
14 were false; and that his phone is backed up through iCloud and images. (WD Ex. N).
15 Through the Certification, Musk also feigned an attempt to search his phone. But the
16 search was calculated to avoid discovering responsive information and, indeed, failed
17 to uncover any of the Musk text messages the third parties produced at their
18 depositions. (*See id.*).

19 The Certification does not purport to have searched Musk's iCloud for
20 responsive documents or correspondence, but merely to have employed absurdly

21
22 ⁶ In fact, The Boring Company's records custodian affidavit was signed by Birchall
23 as a representative of "Foundation Security," (WD Ex. G p. 1), yet Musk's counsel
24 represented in meet and confer correspondence that "the SpaceX tech team who
25 signed that declaration" confirmed that Musk's iCloud has been searched for
26 responsive documents, (WD Ex. B p. 3). The records custodian affidavit signed by
27 Birchall, not the SpaceX tech team, says absolutely nothing about iCloud, and appears
28 to have been signed by Birchall on behalf of a security company called Foundation
Security. (WD Ex. G p. 1). Before Musk sent The Boring Company's records
custodian affidavit, Musk never disclosed the existence of "Foundation Security"—
which appears to be a detective company for which Birchall (who spearheaded
Musk's investigation into Unsworth) serves as the CEO. (WD ¶ 10).

1 narrow search terms. (*See id.*). Nor does it purport to have searched any of the
 2 preservation images of Musk’s phone. For instance, Musk’s iCloud was searched only
 3 for “James Howard” rather than “Howard” or “investigator” or “Jupiter,”
 4 independently. (*See id.*). To uncover a communication related to Howard’s
 5 investigation, the text must have Howard’s full name or all three of the words
 6 “Jupiter,” “investig!,” and “Unsworth” in one single text. (*See id.*). To return
 7 responsive information about Musk’s tube and Thailand efforts, a text message would
 8 have to satisfy the following incredibly defined parameters: “(PR or publicity or
 9 publish! or market! or press) and (‘rescue submarine’ or submarine or ‘rescue capsule’
 10 or capsule or ‘rescue tube’ or ‘Thailand’ or rescue).” (*See id.*). Obvious terms such
 11 as “Mac,” “Thai,” “diver!” and “cave” are nowhere to be found. (*See id.*).

12 Given Musk’s prior representations that he had destroyed his cell phone, his
 13 subsequent refusal to search his iCloud, his entirely-too-late search of his iCloud, and
 14 his new attempt to hide behind narrow search terms calculated to avoid revealing text
 15 messages regarding Unsworth, the investigation(s) into Unsworth, and Musk’s efforts
 16 in Thailand (which he has repeatedly made an issue in this case), Plaintiff seeks a
 17 court order requiring Musk to produce documents responsive to any and all of
 18 Unsworth’s seventy-four requests for production of documents that are revealed by
 19 searching his iCloud and other relevant images of his phone for the period between
 20 July 1, 2018, and September 30, 2018, using both (1) an eyes-on, text-by-text review
 21 for all correspondence with all contacts, and (2) a search using the following
 22 keywords:

23 1. Unsworth!	2. Howard!	3. Higgins!	4. Pattaya
24 5. Investig!	6. Thai!	7. Pod	8. Tube
25 9. Sub!	10. Rescue	11. Cave!	12. Dive!
26 13. Chiang	14. Rai	15. BuzzFeed	16. Mac
27 17. Stanton	18. Tham	19. Luang	20. Rowena

21.Consul	22.Prime	23.Minister	24.Bangkok
25.Off w/3 record	26.Coach	27.Soccer	28.Apolog!
29.Tweet	30.Twitter	31.Brickhouse	32.Lin w/3 Wood

This is necessary to ensure fairness and a complete factual record. In this litigation and in his motion for summary judgment, Musk has attempted to defend his conduct on the basis of actual malice by claiming that certain (false) information was relayed to him orally, (*see, e.g.*, ECF No. 58 at 7-8)—although it is now undisputed that nobody at any time told Musk that Unsworth was a pedophile, child rapist, or had a child bride, (*see, e.g.*, ECF No. 75 at 9-10). As a result, following Musk’s and Birchall’s depositions, Unsworth has repeatedly asked that Musk search his iCloud. (WD ¶ 7, Exs. A (pp. 1-3, 5, 13, 19, 26-28), B (pp. 1, 3), and C (pp. 1, 6)). Throughout the discovery period, Musk responded with blanket denials that correspondence exists on his iCloud, while refusing to affirmatively state that Musk’s iCloud had been searched, when it was searched, or by whom. (WD ¶ 7, Exs. A (pp. 1-3, 5, 13, 19, 26-28), B (pp. 1, 3), and C (pp. 1, 6)). Now that discovery has expired, Musk has provided the Certification, which appears calculated to avoid production of relevant materials and likely an effort to avoid sanctions.

Musk will undoubtedly cast stones by arguing that Unsworth himself did not produce text messages with his significant other, Tik, and that Unsworth did not produce media from his Line chats. Tik testified that they were consistently together during the relevant period, and thus were not texting about the rescue or Musk’s attacks. (WD Ex. Q (59:15-18, 61:3-62:5)). When queried as to any subject matter relevant to this lawsuit, Tik specifically testified that no relevant electronic communications exist, (*id.* (59:15-18)), despite Musk’s misrepresentative claims to

1 the contrary, (WD Ex. A (p. 18); *see also* Ex. G (p. 3)).⁷ As for the Line chats, *just*
2 *like Musk did with WhatsApp chats*, Unsworth produced the text of the chats, but faced
3 technical difficulties producing the chats in a manner that embedded the emojis,
4 photos, and videos.⁸ (WD Ex. G (pp. 4-5)). None of this provides a basis for Musk to
5 hide relevant text messages that indisputably exist.

6 Thus, in light of Musk's prior representations that his cell phone was wiped
7 clean earlier this year *while litigation was pending*, and the subsequent revelation that
8 it was backed up through iCloud and an image, Unsworth asks the Court to compel
9 Musk to search his iCloud and phone images and then produce the responsive
10 documents and correspondence, as requested herein.⁹

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20 ⁷ Indeed, Musk's counsel disingenuously states he was told that Unsworth and his
21 significant other "never communicated electronically," despite clear evidence to the
22 contrary.

23 ⁸ In fact, unlike Musk who produced no such images, Unsworth produced the
24 images associated with his WhatsApp chats. (WD Ex. G (pp. 4-5)).

25 ⁹ Rather than seeking a discovery master and/or an order compelling a forensic image
26 of Musk's electronic storage, which Unsworth may well be entitled to in light of
27 Musk's destruction of his cell phone, Unsworth has sought to compromise on this
28 issue merely by requiring a written statement of the efforts undertaken to search for
Musk's personal electronic records. Further, Unsworth may choose to move for
sanctions in the form of either striking Musk's Answer or for an adverse inference at
trial in light of Musk's failure to even search his phone for responsive records until
October 1, 2019, three weeks after discovery closed and two months before trial.

1 DATED: October 22, 2019

Respectfully submitted,
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21 Pursuant to L.R. 5-4.3.4(a)(2)(i), the
22 filer hereby attests that all signatories
23 listed, and on whose behalf this filing is
24 submitted, concur in the filing's content
25 and have authorized the filing.

26 /s/L. Lin Wood